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## **Gender, Race and Justification: The Value of Critical Discourse Analysis (CDA) in Contemporary Settler Colonial Contexts**

By Caroline Hodes<sup>1</sup>

### **Abstract**

This paper outlines an approach to critical discourse analysis (CDA) that can be used to examine multiple forms of textual data as part of decolonial practice in any national context that is struggling to acknowledge both its colonial past and its ongoing colonial present. The author provides an explanation of what CDA is followed by a discussion of the methods used in a larger multi-level analysis focused on the impact of the defense witness testimony in a Canadian Pacific salmon fisheries case. The larger project has recently been published in the *Windsor Yearbook of Access to Justice*. This paper will show how elements of this approach have been used to identify and analyze the strategies of argumentation and justification that are foundational to gendered colonial discourses on race discrimination and property in *R. v. Kapp*. Contrary to the artificial dichotomy between theory and practice, CDA is not distinct from social and political action. It can instead play a role in identifying the obstacles to, and creating the conditions for, meaningful dialogue and sustainable collaboration.

**Keywords:** Critical Discourse Analysis (CDA), settler colonialism, Canadian colonial discourse

### **Introduction: the sociopolitical context**

In 2015, the Truth and Reconciliation Commission of Canada (TRC) released ninety-four calls to action outlining concrete ways that Canadian individuals, governments and institutions can work to redress the legacies of residential schools. The history of residential schools in Canada is long, complex and takes place over more than a century (Regan, 2010). As described in the Truth and Reconciliation Commission's final report, these schools were created as part of larger processes of colonization, assimilation and dispossession where the Canadian government sought control over Indigenous lands, Peoples and systems of governance (Sinclair, Littlechild & Wilson, 2015). The policies, paternalism and racism that made these schools possible, what took place inside them, and the legacies that remain after the last of them was closed in 1996 have been named acts of genocide by many commentators and the Commission itself (Fontaine and Farber, 2013; Fraser and Mosby 2015; McLachlin, 2015; Palmater, 2016; Saganesh 2017; Staniforth, 2015; Stote, 2015; Sinclair, Littlechild & Wilson, 2015). Many of the recommendations contained in the TRC's ninety-four calls to action look to redress some of this complexity through transformations

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to primary, secondary and university curricula and pedagogical practice. The other recommendations look to the transformation of a wide range of public policy, law and litigation strategies.

Of the ninety-four calls to action, two of them specifically call for “the repudiation of concepts used to justify European sovereignty over Indigenous lands and Peoples such as the Doctrine of Discovery and *terra nullius*” and to “reform those laws, government policies, and litigation strategies that rely on such concepts” (Sinclair, Littlechild and Wilson, 2015). These two calls to action are rooted in the historical nation-to-nation treaty relationships between Indigenous peoples and the Crown. Number forty-five specifically asks for the development of a Royal Proclamation of Reconciliation built on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764. This Proclamation would work in conjunction with the *United Nations Declaration on the Rights of Indigenous Peoples* to reinvigorate the core values of these two historic agreements.

In this framework, Indigenous Peoples would be recognized as self-governing nations that inhabited the land prior to European settlement and for their role in confederation. In addition, Indigenous law, including methods of negotiation, would play a significant role in resolving claims to land and resources. Although these two calls to action are directed specifically at the Government of Canada on behalf of all Canadians, the Principles of Reconciliation upon which each of them is founded, also recognize that all Canadians are treaty people, and as such, they share an individual as well as a collective responsibility in establishing and maintaining mutually respectful relationships in all areas of life (Sinclair, Littlechild and Wilson, 2015).

While these are laudable goals, there exist considerable social and structural impediments to their realization. Nation building in settler colonial contexts is dependent on “categorical forms of recognition and misrecognition [that] are indebted to deep philosophical histories of seeing and knowing” (Simpson, 2007, p. 69). Through text, talk, legal and political action, colonial mythologies are often reproduced through discourse as common sense or accepted knowledge reified as truth, reality and/or fact (Foucault, 1981: 54-55; Gebhard, 2017; Howsam, 2015; Jäger, 2001: 34; Reid, 2014; Weedon, 1987: 75-80). For some, Truth and Reconciliation Commissions work to further an asymmetrical and non-reciprocal colonial politics of recognition not only in Canada but in other national contexts (Cornthassel and Holder, 2008; Coulthard 2014; Matsunaga, 2016; Simpson 2015). Discourse thereby becomes the means through which struggles over recognition, reality, identity, belonging and entitlement take place.

This paper outlines a larger study that has been designed to examine the re-contextualization of colonial discourse in the context of a Pacific salmon fisheries case: *R. v. Kapp*. This larger work has recently been published in the *Windsor Yearbook of Access to Justice*. Although *R. v. Kapp* was decided prior to the findings of the TRC, the strategies of argumentation and justification that are used by both witnesses and judges in this case result in the materialization of colonial discourse. The shared discursive representations of reality and experience in this case persist in other contexts in the present. The following discussion provides a background to the *R. v. Kapp* case and an explanation of what critical discourse analysis (CDA) is. The paper then concludes with a review of how CDA can be used to identify and analyze strategies of argumentation and justification that are foundational to gendered colonial discourses on race discrimination and property in contemporary court cases. The analytic tools described here can be applied across a range of different institutional settings in contemporary settler colonial contexts. Before sustainable collaboration or partnership can take place, it is important to identify the obstacles to meaningful dialogue.

## **Framing the Fishery**

In their analysis of the testimony given in U.S. Congressional hearings over salmon recovery policy, White and Hall (2008) have demonstrated that “discourse analysis is a powerful tool for understanding framing” or the means by which different groups assert their shared perceptions of reality in order to generate policy outcomes (p. 33). Erving Goffman (1974) posits that “all social frameworks require rules” and that these rules are shared in the construction and maintenance of the primary frameworks, or belief systems, that make up a group’s cosmology (pp. 24-27). The approach to discourse analysis outlined in this paper shares White and Hall’s (2008) emphasis on the meso-level of shared meanings and themes between witnesses, but it also points to the importance of engaging in both the macro and micro-levels of discourse analysis in order to reveal the impact of those shared meanings across institutional contexts. The primary frameworks or belief systems that Goffman (1974) describes both shape and are shaped by the reach and limits of discursive representation at the macro level through the rules that govern institutional contexts. At the micro-level, they are communicated through individual strategies of argumentation and justification that are both rooted in and maintain the racialized gender hierarchies present in broader sociopolitical contexts.

The data analyzed for this paper are taken from a larger project that, in part, examines how fourteen defense witnesses discursively represented their perceptions of the effects of a pilot sales program (PSP) that was part of a larger government led strategy aimed at resolving Indigenous fishing rights claims before they went to court. Excerpts of his testimony were recontextualized in a number of the judicial decisions. What is notable about this case is that it was initiated by a group of commercial fishers who claimed that they felt excluded from a PSP that allocated communal commercial fishing licenses to First Nations who had negotiated agreements with the Department of Fisheries and Oceans, Canada. Central to their claim was the presumption that this program was discriminatory because it opened the commercial salmon fishery to members of the Musqueam Band, the Tsleil-Waututh and the Tsawwassen First Nations for a period of twenty-four hours before the rest of the commercial fleet could access it. They expressed their opposition by fishing at a prohibited time, an offence punishable by imprisonment and fines of up to one hundred thousand dollars under the *Fisheries Act*. They did this with the full intention of bringing a constitutional equality rights challenge through the courts.

The commercial fishers in this case successfully mobilized themselves as a cohesive community with enough political power to not only influence public discourse in the mainstream news media but to also garner the legal and financial support to propel their case to the Supreme Court of Canada. The BC Fisheries Survival Coalition, a non-registered group of commercial fishers who have a history of challenging government programs that aim to honour Indigenous rights and title, not only helped to direct the litigation but they provided a significant amount of financial support for this case (Hodes, 2017, p. 130). Despite the BC Provincial Court ruling in their favour, in the end the commercial fishers failed to show that they had experienced discrimination on multiple levels of appeal and they lost their case at the Supreme Court of Canada.

British Columbia Supreme Court Justice Brenner shifted the discourse considerably when he concluded that the Provincial Court Judge’s ruling had accorded the defense witness testimony more weight than reality (Brenner, J., 2006, para. 75). Although the case did not garner the outcome that the commercial fishers wanted, the larger study concludes with a description of how in the longer term the Supreme Court of Canada ruling worked to further entrench already existing obstacles for future claimants attempting to plead discrimination on the basis of poverty at the

same time as it secured the proprietary interests of the settler state through an opaque restatement of *terra nullius*.

In the larger project an approach to CDA was developed in order to identify and unpack both the explicit and opaque socially shared sets of rules, or *topoi* that resulted in particular conclusions about reality and experience in this case. When used in conjunction with thematic coding, this approach provided a particularly useful set of analytical tools for unpacking the discursive strategies used by the commercial fishers to produce the shared meanings necessary to represent their reality and experiences through argumentation and justification in court. Rooted in a broader sociopolitical context of denial and misrecognition, these strategies were used to justify social action directed at perpetuating and maintaining settler occupation and Indigenous erasure not only in the defense witness testimony, but also in the BC Provincial Court ruling in this case.

### **What is critical discourse analysis (CDA)?**

Qualitative discourse analysis in the social sciences has been broadly defined as “a general framework for problem-oriented social research” (Wodak, 2008, p. 2). Critical Discourse Analysis (CDA) draws on “prevailing social problems” as its point of departure and is characterized by interdisciplinarity, multimodality and a concern with the development of context (van Dijk, 1986, p. 4). Context is established through an understanding of institutional frameworks; the history and social location of the actors involved and the institutions that are implicated; the interdiscursive and intertextual relationships between texts, utterances, discourses and genres within a variety of different fields of action; and it pays close attention to extralinguistic, sociological and structural variables that limit or expand the range of discursive possibilities within a given context (Wodak, 2008, p. 2; Fairclough, 2001, pp. 122, 123).

Different approaches to CDA investigate the intersections of history and ideology in a given spoken or written text and they analyze “opaque as well as transparent structural relationships of dominance, discrimination, power and control as manifested in language” (Wodak, 2001, p.2 2; Fairclough, 2001; van Dijk, 2001, p. 96). CDA does not (re) produce simple deterministic relationships between language and the social world. Instead, it calls on researchers to investigate the multiple ways that “language mediates ideology” through the production of discourse in the context of social institutions (Wodak, 2001, p. 3; Fairclough, 2001). Language is therefore not descriptive of an *a priori* reality, an organizing principle attached to reality or a way of communicating truth. Rather, it plays a role in making manifest the realities it purports to describe (Foucault, 1981; Jäger, 2001). It is also “structured by dominance” in the sense that text and talk are socially, historically and geographically situated and that dominant languages are mediated by the interests and ideologies of powerful groups of people (Wodak, 2001, p. 3).

Critical discourse analysis, however, is neither a method nor is it a theory. Instead, it emerged as a small network of scholars in the 1990’s and has since developed into “an established paradigm in linguistics” that intersects with methodological approaches in the humanities and social sciences (Wodak, 2001, p. 4; Fairclough, 2001, p.121; van Dijk, 2000, p. 96). The researchers who situate their work in terms of CDA are therefore bound less by common theories or methods than by a particular program of research (Wodak, 2001, p. 4). Many researchers who situate their work in terms of CDA take a pragmatic approach to theory and method by relating theoretical questions and concepts directly to the specific problems under investigation and choosing those methods that will equip them with the best tools to answer their research questions. As a result, instead of asking whether or not they require a grand theory or a prescriptive disciplinary method,

these researchers ask: what conceptual tools are relevant for this or that problem and for this or that context (Wodak, 2001, p. 64)? Although it may seem that every approach to CDA is different, many approaches share these basic commonalities along with a foundational commitment to the principle of critique and to critical theory.

Critical discourse analysis, however, is not without its own critics. James Martin (2004) has drawn attention to CDA's emphasis on objectionable, offensive and problematic speech acts and texts suggesting that critique is about negativity and that researchers should also emphasize those texts and speech acts that are admirable and motivating. Henry Widdowson (1995 and 2004) has drawn attention to the alleged absence of any kind of systematic analysis of entire texts, co-texts and contextual relations in research that relies on CDA leading to contentions about its lack of objectivity and scientificity. Igor Žagar (2010) has taken issue with its broad use of the term *topoi* arguing that they are largely misconstrued in the literature and that researchers often fail to provide examples taken from data.

Critique, however, is not about negativity. It is, following Wodak, a way of refusing to take things for granted. It is a way of "opening up complexity, challenging reductionism, dogmatism and dichotomies, being self-reflective, and making opaque structures of power relations and ideologies" visible (Kendall, 2007). It is also about maintaining a critical distance from the data, contextualizing it in social action but nevertheless acknowledging one's own political positioning. Claims to scientific neutrality and objectivity have long been under scrutiny by feminist, critical race, post and decolonial scholars for failing to acknowledge that all knowledge production is socially and historically situated in addition to being mediated by social values and presumptions (Lazar, 2007; Harding, 1986; Haraway, 1991). With these criteria and the socio-political context that I have set out at the beginning in mind, in the following section, I will describe the approach that I have taken in my broader analysis of *R. v. Kapp* that answers some of Žagar's (2010) concerns in my examination of *topoi*.

### **CDA in colonial context**

Discourse can be defined broadly to refer to complex knowledge systems that are both created and maintained in the context of everyday life and social institutions. They derive their power through the levels of truth status that accrue to them and are thereby key sites of struggle over identity, reality, belonging and entitlement (Foucault, 1981; Jäger, 2001; Weedon, 1987; Wodak 2008). In the following examples, I will outline two of the central discourses used by the commercial fishers who testified in *R. v. Kapp* to justify their sense of entitlement to the fisheries.

In order to identify these discourses and their supporting systems of argumentation, I developed an approach to CDA used in conjunction with thematic coding. Through this approach, I was able to deconstruct the content of the discourses on property and discrimination that the commercial fishers relied on in their testimony and to show how these had been generated in the context of those "deep philosophical histories" that Simpson (2007) is addressing in her work. Following the pragmatic approach to theory outlined earlier, I chose a number of conceptual tools that were relevant to the context and the problems under consideration. These all emerged from the common themes identified in the meso-level analysis of the corpus of data. This approach enabled me to include a range of theory and to modify Wodak's discourse historical approach to consider not only the broader history of the case, the institutional infrastructure of the legal system within which it is embedded, and which institutional actors have produced what texts but also the

history of ideas, and the intertextual and interdiscursive elements that inform the construction of the legal concepts that structure the outcomes in these kinds of cases.

The larger study is entitled “Colonial Legacies and Competing Masculinities: The Supreme Court of Canada’s return to reason in *R. v. Kapp*” (Hodes, 2017). The reference to colonial legacies in the title points to the many ways that colonial discourse is materialized in the present thereby challenging the notion that it can be relegated to the past. The return to reason in the title of this project refers to a return to the androcentrism of liberal humanism through the privileging of a certain type of normative hegemonic masculinity that disproportionately values the mind over the body and reason over emotion (Naffine 1990; Smart 1987; Thornton 1987). This, in combination with the phallogocentrism of law, reifies colonial status hierarchies through discursive processes of gendered racialization in this case (Smart, 1989). Although this case was pleaded as a race discrimination case, the way that the defense witnesses and the judiciary invoked gender through their linguistic choices also highlights the ongoing importance of Angela Harris (2000) and Kimberlé Crenshaw’s (1989 & 1990) calls for a critical examination of the gender dynamics that are at play in cases that are framed by race alone.

Phallogocentrism elides phallocentricity, or what Carol Smart refers to as “the masculine heterosexual imperative,” with logocentrism, the idea that linguistic signs are distinct from the reality that they purport to describe (Smart, 1989). Smart’s assessment that “knowledge is not neutral but produced under conditions of patriarchy” is central to how different forms of racism manifest in discourse and it is a provocation to the stories that both the law and some forms of linguistic analysis tell themselves about themselves (Hodes, 2017). Namely, the mutually reinforcing presuppositions that language is a representation of a pre-existing reality, that discrimination only ever happens on a single axis and that the law is a means to administer blind justice through abstraction and objectivity (Naffine, 1990; Smart, 1989; Crenshaw, 1989).

The return to reason is also a return to what Eve Tuck and Wayne Yang (2012) have referred to as “settler moves to innocence” that serve both internal and external forms of colonialism and reinforce racialized and gendered settler colonial relations. These moves to innocence are generally characterized by a variety of methods of argumentation and justification that are intended to absolve those who identify with the authority of the settler state of their culpability in ongoing settler colonial practice. To consider the range of contradictory and sometimes competing discourses at work in this corpus of data, each text was divided according to theme in order to develop a coding template.

### **Thematic Coding and Topoi**

Following the basic premises of template analysis, using NVivo software, sections of each text were indexed according to the thematic codes that emerged from the data. Template analysis takes its cues from grounded theory. Grounded theory is an approach to qualitative social research that develops theory inductively from a corpus of data (Glaser and Strauss, 1967). Taking the themes that emerged from the data, it was possible to trace many of the discourses present in the defense witness testimony, including the legal foundations of both identity and the legal construction of the fisheries as common property resources, to the ideas contained in the works of John Locke (Hodes, 2017). John Locke thereby performs an author function in this project (Foucault, 1981). His name becomes the means through which to classify the collection of colonial discourses that are repeated across a range of the data that informs and makes up this case (Hodes, 2017 and 2017a).

Template analysis takes a hierarchical approach to themes, but unlike other thematic approaches it is pragmatic in terms of the number of levels that a researcher may choose to use. As such, rather than developing the full coding template prior to analyzing the data, researchers begin with a subset of data and as they begin to notice common themes emerging, they create a preliminary *a priori* template through which to begin analysis of the rest of the data (Brooks, McCluskey, Turley and King, 2015). Coding is therefore part of the process of analysis. As new themes emerge, the template is revised and modified. Like the pragmatic approach to theory central to many approaches to CDA, the researcher uses as many thematic levels as are necessary to analyze the data (Brooks, McCluskey, Turley and King, 2015, p. 203). Unavoidably, as the analysis proceeds, sub-themes within the broader themes will also begin to emerge. Following Jäger, these are represented in this paper as discourse strands (Jäger, 2001, p. 47). The discourse strands are embedded within themes to support an overarching discourse and can also be viewed as embedded sub-themes. The discourse strands rely on topoi to establish meaning.

In argumentation theory, topoi rely on causal argumentation schemes from which the premises are either explicit or can be inferred. They can be used to both find and test arguments and as such, they can be generalized as topics that contain different formulae, or general argumentative patterns, in order to generate particular kinds of conclusions (Wodak, 2001, pp. 74-75; Žagar, 2010, pp.18-18). The concrete arguments that emerge in the witness testimony and judicial decisions are the manifestation of these patterns and topics through text and talk in context (Žagar, 2010, p. 17). In this project, their content has been outlined through conditional formulae. The inter-relationships that emerge between the themes, discourse strands and topoi fit together to create the knowledge that is advanced through particular discourses.

Starting with the judicial decisions as my preliminary dataset, I created a template that allowed for a consideration of what re-appeared in the context of other textual data. As new themes and discourse strands emerged, the template was modified. Because individually they represent an archive of textual materials from which a corpus of data can be constructed, I initiated with the judicial decisions. Judicial decisions are deeply intertextual and interdiscursive. Intertextuality means that all texts are linked to other texts both past and present by making reference to people, places and/or events and/or by citing other textual materials and restating key arguments and/or passages in a new context (Wodak, 2008, p. 3). This process is referred to as recontextualization. Interdiscursivity is different in that it refers to the ways that discourses are linked to one another. Themes, discourse strands and topoi became central to the production of discourse in this project. As a result, the discourses on discrimination that emerged through a range of the data relied on a number of different interrelated themes, discourse strands and/or topoi that, at times, connected different overarching discourses to one another. In the examples provided below, I will show the interdiscursive relationships that inform discourses on discrimination and property in the witness testimony. Prior to discussing these examples, however, it is important to first take note of the importance of institutional context to this type of analysis.

### **Matters of Institutional Context**

Understanding the impact of this testimony and the discourses, their themes and underlying topoi is entirely dependent on understanding the institutional context. All language activity in courtrooms is produced in the context of what M.A.K. Halliday (1964) refers to as a restricted language. Restricted languages are those that are characterized by impersonal uniformity, limitations on idiolect (the speech habits peculiar to a particular person) and dialect. They are also



limited in terms of the number of formal items and patterns that they contain. This can be seen in many of the shared nominations, topoi and discourse strands in the testimony, judicial decisions and briefs in this case (Halliday, 1964, p. 24). Because of this, there was limited concern with the number of times anything had been repeated. What can be said in this context is largely circumscribed by both the rules of evidence and precedent (*stare decisis*). The rules of evidence limit what and how something can be said leading to many erasures and silences that may not be able to be counted; *stare decisis* ensures that some things will be repeated and modified indefinitely or until a precedent is overturned. What became important about precedents in this project is how they were recontextualized and how judicial interpretations of the same passages changed over time.

There are a range of different occupational roles, speech acts and textual materials that make an appearance in litigation. Language is thereby more restricted for some actors than it is for others and it is more restricted in some modalities than others. Judicial decisions, for example, will be far more restricted than witness testimony by virtue of the nature of the role of the judge, the rules about how to interpret the law, and, if they appear in textual forms, the limitations that are placed on the production of official documents. While there is more room for idiolect to be present in witness testimony, what can be said and how it ought to be said is still restricted by the rules of evidence and judicial discretion. For instance, there are many ways to impeach the credibility of a witness including establishing bias and collusion. Bias is said to occur when witnesses have a vested interest in the outcome of a case. Collusion is said to occur when a witness's recollection of events has been influenced by others (Burke, 1996, paras. 42-45). A finding of bias or collusion between witnesses can discredit their testimony and result in little or no weight accruing to their evidence.

In *R. v. Kapp*, the government lawyers (referred to as "the Crown") attempted to impeach the defense witnesses by drawing into question their motivation for testifying and pointing to the similarities in their testimony (Kitchen, J. 2003, para. 149). The Crown argued that because some of the witnesses were charged on parallel proceedings that were moving through the courts at the same time, they had a vested interest in the outcome of the claim and were therefore biased. They then raised the possibility that the witnesses had collaborated in the fabrication of testimony because they were all among the same group who had initiated the protest. The Crown also invoked the rules for establishing standing in constitutional equality rights cases. These rules are complex and it is not within the scope of this paper to outline them here. The essence of the argument was that the commercial fishers did not share sufficient personal characteristics to meet the threshold of what constitutes a disadvantaged group for claiming discrimination under the equality rights provisions of the *Canadian Charter*. The Crown argued that they were too heterogeneous a group to plead on the ground of race.

Although each of these attempts at impeachment failed, they are illustrative of how important it is to understand the institutional context prior to analysis. In the following section, the discussion will focus on how themes, discourse strands and topoi work together to produce an overarching discourse on discrimination in the commercial fishers' testimony.

## **Discrimination**

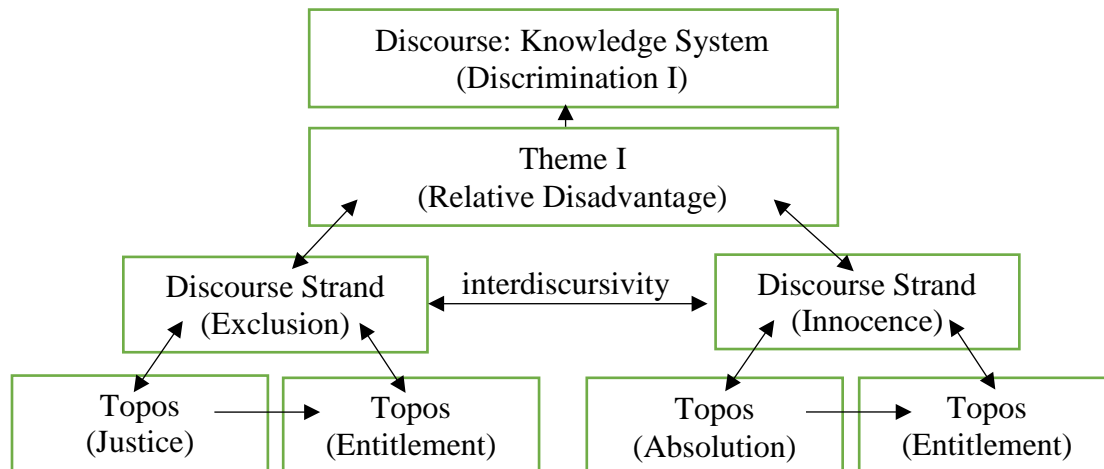
The following examples illustrate how in contemporary discrimination cases the process through which people and places are discursively recognized is often opaque and paradoxical. Rather than relying on a prism of cultural difference through which to advance claims superior

civilization as is typically the case in reiterations of colonial legal doctrines, the commercial fishers and the Provincial Court Judge in *R. v. Kapp* created a discourse on discrimination that was predicated on sameness, or formal equality, in order to preserve a settler colonial status quo. This particular discourse is often referred to as colorblindness in U.S. race discrimination claims that rely on the same logic. Central to colorblind discourse is the presumption that all racial classifications, including those used to remedy historical wrongs, are invidious. In fact, legal counsel for the commercial fishers relied on the argument presented in *Parents Involved in Community Schools v. Seattle School District no. 1 et. al.* (2007), a U.S. Supreme Court decision where the diversity initiatives of two school districts were held to be unconstitutional due to their use of racial classifications in student assignments.

Relative disadvantage is one example of the many different themes that emerged in the discourse on discrimination in this case. Depending on the discourse strands and topoi that were used to inform it, this theme produced different meanings and associations leading to disputes over the veracity of the commercial fishers' claim and the credibility of the witnesses at different levels of court. A closer look at it here reveals how themes, discourse strands and topoi work together in support of different discourses on discrimination.

Relative disadvantage often intersects with other themes and discourse strands in this case. Relying on the same theme, a second, competing discourse on discrimination emerged in the appellate court decisions and the Supreme Court of Canada's ruling. This discourse was based on legal principles of substantive equality, or differential treatment to yield equality of result. Ultimately, the meaning of discrimination in this case becomes a discursive contest between formal and substantive equality. This distinction, in conjunction with the unacknowledged gender dynamics at work in this case, eventually led to the undoing of the commercial fishers' claim of race discrimination at the same time as it resettled the fishery through an opaque restatement of *terra nullius* in the final Supreme Court ruling.

In the following example of a discourse on discrimination rooted in formal equality, both the theme and discourse strands are dependent on the conclusions reached by means of the following topoi: justice, entitlement and absolution. In order to advance the conclusion that they had been excluded and thereby disadvantaged, the topoi of justice and entitlement were used together in the commercial fishers' testimony. The topos of entitlement also connects the discourse strands of exclusion and innocence creating a set of interdiscursive relationships that speak to the overarching knowledge that informs the particular discourse on discrimination advanced in the defense witness testimony and that is recontextualized in the BC Provincial Court Judge's ruling. A visual representation of this phenomenon would like this:



The topoi of justice and entitlement often appear together in the Judge's ruling to signal first that the commercial fishers had been disadvantaged because they were excluded from the pilot sales program on the basis of their personal characteristics and second, that this was an injustice because the means by which they self-identified entitled them to fish during the twenty-four-hour period. This finding is predicated on the presumption that it was unjust for the government to create a policy measure whereby some people would be treated differently than others on the basis of what the commercial fishers understood to be race. The topos of justice results in a restatement of the principle of formal equality whereby likes should be treated alike. This can be distilled into the following conditional formula: if X and Y are similar, X and Y should be treated the same way. The topos of entitlement reinforces this sameness through this conditional formula: if X has A, then Y should also have A. Together, the topoi of justice and entitlement create a causal argumentation scheme whereby sameness is twice reinforced: because we are all the same and should be treated the same way, I am entitled to fish during this twenty-four hour period. Entitlement is therefore contingent on the conclusions reached through the topos of justice. Consider the following fragments of witness testimony:

- Claim:* If X is similar to me, X and I should be treated the same way (Topos: justice):
- Witness 1:* "We're all Canadians, aren't we?" (*R. v. Kapp*, 2003, para. 97)
- Witness 2:* "We were part of the fishery. It was part of our heritage. It was what we were going to do in the future... You'd have other groups of people that you knew in fact were part of the fishery that maybe didn't get one [a fish] and that you would share with, including Aboriginal folks..." (para. 110)
- Therefore,*
- Claim:* If X has A, Y should also have A reformulated as If Y doesn't have A, why should X? (Topos: entitlement):
- Witness 1:* "I don't see us having our own special fishery at certain times with no Indians in them..."
- Claim:* If X has A, Y should also have A
- Witness 2:* "There should be one commercial fishery. On manageable commercial fishery instead of two" (para. 109).

*Effect of the pilot sales program:*

*Witness 1:* “I don't feel like a Canadian any more. I feel like half a Canadian because I feel that I've had my rights removed from me” (Para. 106).

*Witness 2:* “[I]f you grew up in the fishery and it was part of your heritage, and it was suddenly ripped from you, the feeling that you were something less of a Canadian in the process or something less than average is welled up pretty much...” (para. 106)

*Conclusion:* The pilot sales program is discriminatory.

The first discourse strand, exclusion, is rooted in the commercial fishers' perceptions of the twenty-four-hour restrictions on access to the fishery. It is dependent on the interdiscursive relationship between the topoi of justice and entitlement. Together, these micro-strategies of argumentation led to conclusions that were central to the overarching discourse on discrimination and different ways of framing the pilot sales program. While the two witnesses cited above concluded that the pilot sales program resulted in their exclusion from full citizenship and the ability to exercise what they perceived to be their rights, other witnesses claimed that being excluded from the pilot sales fishery threatened their livelihood by disproportionately benefiting Indigenous fishers. In certain cases, the witnesses claimed that at one time anyone could start from humble beginnings, begin a commercial fishing enterprise and succeed against all odds, but pilot sales restricted this opportunity to a chosen few.

Each of these ways of framing the pilot sales program leads to a finding of relative disadvantage in the BC Provincial Court ruling. The Provincial Court Judge summarized this understanding of the effects of the pilot sales program in one phrase that was deemed to be a popular expression used on the river to describe the requirements of a commercial fisher prior to pilot sales: “a buck, a boat and a net” (Kitchen, J., 2003, para. 90). In other words: everyone, regardless of race, class or gender could become a commercial fisher. He recontextualizes this testimony in his reasons for the finding of discrimination in conjunction with the testimony of a number of other witnesses who articulated similar versions of this story, several of whom were introduced as coming from humble beginnings.

### **Gendering the Fishery**

The second discourse strand, innocence, works in an interdiscursive relationship to exclusion through the topos of entitlement as shown in the diagram above. This is done in a way that is illustrative of the material effects of what Tuck and Yang refer to as “settler moves to innocence.” Settler moves to innocence are grounded in discursive strategies such as the construction of in-groups, out-groups and practices of nomination that include self and other identification. Following Vine Deloria Jr. (1988), Tuck and Yang (2012) have theorized the invocation of Native grandmothers as a key settler move to innocence. This is often part of a process that they refer to as settler nativism. They describe this as an attempt to deflect a settler identity in order to justify the continued occupation of stolen land and the ongoing ability to benefit from the privileges accrued as a result of colonization. Vine Deloria Jr. (1988) has theorized the gendered nature of settler nativism through what he calls “the Indian grandmother complex.”

Deloria Jr. (1988) describes multiple reasons why a grandmother might have more appeal than a male relative, indicating that for settlers “[a] male ancestor has too much of the aura of the savage warrior, the unknown primitive, the instinctive animal to make him a respectable member of the family tree” (pp. 2-4; cited in Tuck and Yang, 2012: 11 and Hodes, 2017, p. 138 & 139). In the witness testimony, innocence is thereby advanced through the invocation of kinship relationships and the topoi of entitlement and absolution work together through the following conditional formulae: If X has A, Y should also have A; because Y is related to X, Y should not be punished for their actions. Judge Kitchen’s recontextualization of Robert McKamey’s decision to invoke the “Native lady” that McKamey’s great, great grandfather married in his testimony is illustrative. McKamey’s testimony is of particular importance in this case because the Provincial Court Judge foregrounds all of the other testimony through McKamey’s patrilineal narrative of entitlement to the fishery. This is done in conjunction with absolution in order to reinforce the theme of relative disadvantage and maintain a formal equality framework for discrimination. This testimony also serves as the vehicle through which the fisheries become both racialized and gendered.

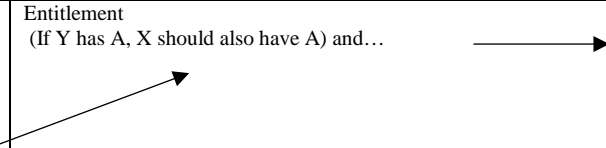
Historical legal records reveal that at times, early settlers had both Indigenous and non-Indigenous wives, sometimes concurrently, at other times consecutively, and on occasion they fathered children with both (*Connolly v. Woolrich*, 1867; Hodes, 2017, p. 138). But because the Provincial Court Judge and the accused invoked a biological conception of race through their perception that to participate in the PSP one was required to have a bloodline connection to the First Nations who negotiated the terms of the program, it can be inferred that the Judge’s inclusion of McKamey’s grandmother was meant to lead to the conclusion that McKamey’s male relatives are her descendants. Even though none of the defense witnesses used the language of bloodlines in the excerpts of their testimony that the Judge cited in his decision, strategies like this one lead to the inference that race is biologically determined.

In conjunction with the invocation of his great, great grandmother, McKamey also claims that before the PSP came along: “[e]veryone was entitled to fish wherever you wanted when fishing was open, and so we fished... You fish where you know how to fish and you know how to fish there because that’s where your dad fished and that’s where your dad’s dad fished” (McKamey in Kitchen J., 2003, paras. 91 and 92). While his proprietary interests in the fishery are secured through the patrilineal line beginning with a settler, his Native great, great grandmother endows him with the requisite sameness, twice reinforced through the topoi of justice and entitlement, to claim access to the fishery. In addition, he also garners absolution through his distant kinship relations as theorized by Tuck and Yang (2012) and Deloria Jr. (1988).

Exclusion and innocence are both reinforced and further linked in the judge’s brief introductions of each witness. These introductions often include details that draw on kinship ties. At times, these details reveal intergenerational and biological connections, at others, they invoke group affiliations. Together, the topoi that underpin exclusion and innocence yield one of two conclusions. The first is aimed at showing that the commercial fishers are the same as the beneficiaries of the PSP, thereby indicating that exclusion is discriminatory. The second absolves the claimant group of their responsibility for both fishing at a prohibited time and accounting for the unearned privileges that they possess as a result of ongoing colonial practice. Each strategy is designed to lead to the overarching conclusion that their actions constitute a legitimate form of civil disobedience in the face of an unjust law.

Either way, underlying both of these discursive strategies is a sense of entitlement to the fishery. Innocence therefore works interdiscursively with exclusion through the topoi of

entitlement to further the overarching theme of relative disadvantage. Many of the other defense witnesses testified to their Native heritage together with a claim of Canadian citizenship. These processes of self-identification were all deeply gendered and often involved discursive strategies of nomination that racialized and feminized the beneficiaries of the pilot sales program who were deemed to have gotten their fish “the easy way” (Logan in Kitchen, J. 2003, paras. 120 and 121). For some of the witnesses, to receive help signaled a failure to achieve the masculinity that was valued in all of their testimony. The distribution of these discursive strategies is outlined in the following table beginning with McKamey’s testimony:

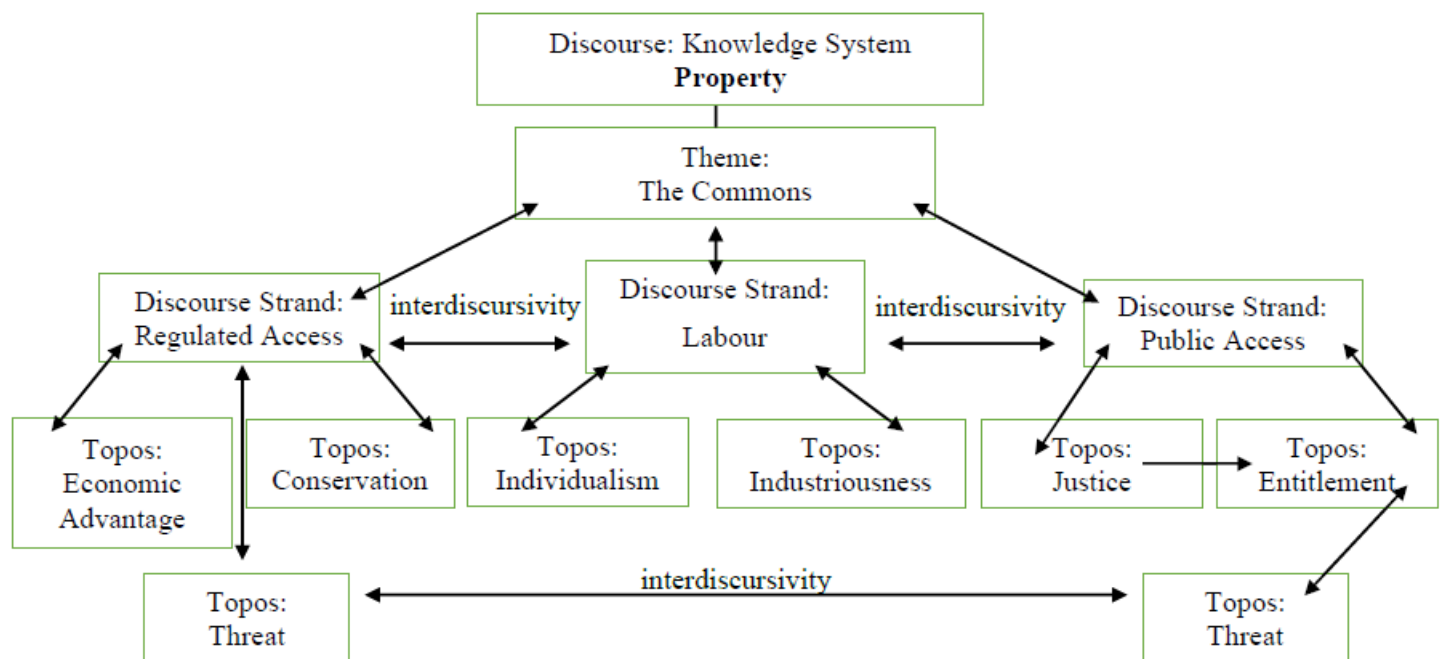
Witnesses	Exclusion	Innocence				
	Justice (Because X and Y are similar, X and Y should be treated the same way) therefore...	Entitlement (If Y has A, X should also have A) and... 				Absolution (If X has kinship ties to Y [or if the law is treating X differently], X should not be punished for breaking the law)
		X= One of several generations of fishers and/or married into fishing	X= Canadian Citizens	X= Indigenous Peoples/people (understood as racial identity)	Civil Disobedience (the law is treating X differently)	Biological Absolution (X has kinship ties to Y)
Robert McKamey	X	X Many generations #unspecified		X Indigenous relatives	X	X
Donna Sonnenberg	X	X Married into	X		X	
Stewart McDonald	X	X 3 <sup>rd</sup> Generation			X	
Jack Groven Humble beginnings	X		X		X	
Stephen Wilson	X	X 5 <sup>th</sup> Generation		X Indigenous relatives	X	X
Michael Forrest	X	X 3 <sup>rd</sup> Generation	X		X	
Lawrence Salmi	X	X Married into		X Métis heritage	X	
Kim Nguyen Vietnamese refugee, humble beginnings	X		X		X	
Debra Logan	X equal in eyes of Lord	X Generations #unspecified	X Don't need gov't help	X Sto:lo ancestry	X	
Richard Nomura Japanese ancestry	X	X 3 <sup>rd</sup> generation	X		X	
George Horne	X			X East Saanich Indian Band	X	
Robert Rezansoff Doukhobor ancestry Humble beginnings	X	X Married into	X		X	
Richard Gregory Outlier: overfishing	X	X Grandfather & father			X	
Leslie Budden Japanese ancestry	X	X Fourth generation			X	

For these witnesses, to be treated differently is grounds for civil disobedience irrespective of the reason, even if the reason includes remedies for systemic discrimination. In this formulation of the topos of absolution, the justification leads back to the formal equality framework of sameness. From the point of view of these witnesses, because civil disobedience challenges unjust laws, those who engage in it are automatically absolved of accountability for their actions, at times due to, and at others irrespective of, their distant kinship ties.

## Property and Threat

This particular discourse on discrimination does not, however, stand alone. The larger project outlines the multiple ways that these two invocations of the topos of absolution work interdiscursively through claims of innocence to confer entitlement to the fisheries upon those who identify with and claim the authority of the settler state. The totality of what this accomplishes in

action can be seen when this discourse on discrimination is unpacked in view of its impact on the discursive construction of the fisheries as one of two things: 1) as a state regulated common property resource or 2) as an idealized commons characterized by a formal equality right of public access. The larger project addresses how each of these conceptions of the fishery is rooted in John Locks's ideas about property, labour the role of the state and God. While it is not possible to show all of this here, the topos of threat becomes central to the discourse on property that appears in both the defense witness testimony and the evidence presented by the Crown. The discourse on property and the underlying topos of threat with its conditional formulae can be conceptualized and seen in the witness testimony as follows:



*Claim (conditional formula):* if a political action or decision [the creation of the PSPs] bears or has resulted in specific dangerous or threatening consequences [poaching], one should not do it or one should repeal it (Topos: Threat).

*Witness (Defense):* "...it [the PSP] offered a way to launder food fish in great quantities that was difficult before pilot sales because if a Native went out food fishing and he had too many fish, it was too difficult to sell them. The Native people would take their fish to cold storage and freeze them and then when a pilot sales fishery came along, that was an opportunity to launder them all through what they believed was a legitimate pilot sales fishery... People had the opportunity to fish for days on end in the food fishing, when the food fishing was open and take the fish to cold storage and sell it to brokers and say it was caught in the pilot sales" (R. v. Kapp, 2003, para. 99).

*Claim (conditional formula):* if there are specific dangers or threats, one should act against them.



*Witness (Minister Crosbie in evidence introduced by the Crown):* “We’re doing this because we think it’s the best public policy, we know for years and years in British Columbia and elsewhere there’s been poaching of fish. We call it poaching. The Aboriginals say they have a right to do it” (para. 47).

*Shared Conclusion:* Indigenous fishers poach and are a threat to the longevity of the salmon fishery.

*Divergent Conclusions:*

*Witness (Defense):* we need one commercial fishery (deregulation).

*Witness (Government):* we need a pilot sales program (more regulation)

Here, the topos of threat is shared between the witnesses for the Crown and the defense and works to scapegoat the Indigenous communities who were the beneficiaries of the PSPs by blaming them not only for the decline of the sockeye in the region through “fish laundering”, but for also creating what the defense witnesses referred to as a segregated fishery. What makes the topos of threat as poaching most notable is that it was not only used to bolster the proprietary claim of the commercial fishers, it was also used as an argumentation strategy to maintain the constitutionality of the program. This occurred despite the evidence introduced at trial showing that poaching was a common practice across commercial fisheries irrespective of community membership. Here, arguments that support formal equality frameworks for discrimination, regulation and deregulation converge in a common semiotics of gendered racism.

## **Conclusion**

The examples provided above are a limited few in an array of discourses that support and maintain settler colonial subject formations and justify forms of occupation at the intersection of race, gender and power in this case. At the micro-level, the discourse strands, themes and topoi that were used by the individual commercial fishers came together to create a discourse on discrimination that became foundational to the ways in which the pilot sales program was framed in the Provincial Court Judge’s ruling and that has transnational implications through the invocation of colorblindness in both the defense witness testimony and the Provincial Court Judge’s formal equality framework for discrimination. At the meso-level, the shared meanings and themes identified in the larger study inform legal analysis and the construction of legal tests for discrimination that have significant implications for contemporary discrimination cases. At the macro-level, this discourse on discrimination is interdiscursively connected to a range of different discourses that are rationalized by means of the topoi of justice, responsibility, entitlement and threat across a number of different cases and institutional contexts.

The discursive (mis) understandings of both discrimination and entitlement to what was understood as a common property resource manifested materially in what the lawyers for the commercial fishers claimed was the largest protest fishery in Canadian history and ten years of litigation. In addition, the Supreme Court of Canada’s final ruling in this case continues to influence the outcomes in contemporary equality rights cases. As shown here, CDA can be an important step in identifying the systems of argumentation and justification that reinforce colonial discourse across a range of institutional contexts. The analytic tools and strategies outlined here are, therefore not only relevant to this case. They can be used across a number of different institutional settings as part of the decolonial practice called for not only by the Truth and

Reconciliation Commission of Canada, but also by its critics. They can also be part of decolonial practice in any national context that is struggling to acknowledge both its colonial past and its ongoing colonial present.

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